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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 2, 2002

By Hand

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistrionix, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

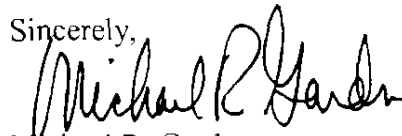
Re: Docket Nos. 02-277, 01-235, 01-317 and 00-244

Dear Secretary Dortch:

On behalf of the Coalition for Program Diversity (CPD), enclosed please find an original and eighteen (18) copies of Coalition's Comments in this proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.



Kenneth Ziffren
Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie & Stiffelman LLP.

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Susan Eid
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Alex Johns
Catherine Bohigian
Sarah Whitesell
Ken Ferree
Jane Mago

Before the
Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

2002 Biennial Regulatory Review) MB Docket No.02-277
)
Cross-Ownership of Broadcast Stations and Newspapers) MM Docket No.01-235
)
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets) MM Docket No.01-317
)
Definition of Radio Markets) MM Docket No.00-244

COMMENTS BY
THE COALITION FOR PROGRAM DIVERSITY

Submitted by:

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Summary

The Coalition for Program Diversity¹ consists of leaders from the creative community and the U.S. advertising industry **who** share a deep concern about the diversity-chilling stranglehold that the **four** networks — ABC, NBC, CBS and Fox — **currently** have over the narrow prime time television programming marketplace.

The prime time television program marketplace is unique — and the programming it generates is particularly critical to the 43 million U.S. consumers who do not have cable or satellite services. Because of the importance of prime time television programming to the **American viewing** public, the Commission **must** take appropriate content neutral action by adopting a 25% Independent Producer Rule that will insure that the prime time programming aired by the four networks is as diverse **as** possible.

Diversity of sources — not the economic efficiencies that the networks **currently** fixate **on** — must be the Commission's primary goal as it analyzes the current prime time television programming marketplace. The Commission **must** address the troublesome reality that in the past decade, independent sources of diverse programming have been dramatically reduced **as** network deregulation prompted a tidal wave of vertical and horizontal mergers — resulting in massive media consolidation. **A** decade ago, 68% of prime time television aired by the four networks **was** produced by independent producers — while today, only 24% of the networks' prime time schedule is obtained

¹ The Coalition for Program Diversity, currently in formation, includes:

- American Federation of Television and **Radio** Artists (AFTRA), New York, NY;
- Carsey-Werner-Mandabach, LLC, Los Angeles, CA;
- Directors Guild of **America** (DGA), **Los Angeles, CA**;
- Marian Rees Associates, **Inc.**, Studio City, **CA**;
- **MediaCom**, New York, NY;
- **Screen** Actors Guild of America (SAG), Los Angeles, CA;
- **Sony** pictures Television, Culver City, CA.

from independent program sources.

This dramatic shrinkage in the independent sources of diverse prime time television programming is further exacerbated by the networks' current overwhelming reliance on in-house, lowest-budget possible programming. Today, the "best" programming chosen by the four network officials who dictate 100% of the prime time television schedule often is not the "best" in traditional terms. For consumers, network programming often is the cheapest, most mainline programming that network officials can simultaneously "rerun" (repurpose) as many times as possible on various network owned broadcast and cable platforms. The result: maximum profits for the networks' parents, not maximum program diversity for consumers.

As documented in Section II of this brief, due to deregulation in the 1990s, the four owners of the major networks have more than doubled the time and numbers of their prime time programs. Today the networks air only 17 hours of independent produced and owned programming on their weekly prime time schedules compared to 47.5 hours a decade ago. Moreover, in contrast to network claims of increased programming costs, the record confirms that the networks have decreased their programming expenditures as a percentage of revenues from 30.3% to 26.3% over the past eight years. This drastic reduction in the sources and funding of diverse prime time television programming is aggravated by the networks bold and brazen negotiating tactics — tactics fostered by the unregulated environment in which the networks now operate with impunity.

To encourage investment in the prime time television programming marketplace — investment that will fuel the development of new and diverse programming — the Commission must adopt a First Amendment friendly 25% Independent Producer Rule that will prevent the four major networks from extracting ownership rights from independent producers. Left unregulated, the networks can and routinely use their dominance to force independent producers to share "backend"

ownership rights. become a network “partner” or go “in-house.” Regardless of what option the independent producer succumbs to in order to get her or his creative product on prime time network television, the independent producers’ control of their program is lost — and the result is **less** diverse programming for the American public.

For the U.S. advertising industry — the essential economic engine of **free** television **in the** United States — the networks’ fixation of bottom line profits is restricting the **ad** industry’s ability to maximize its outreach to consumers. **As** confirmed in Section **III**, network induced blandness **in programming** for prime time television not only **causes** reduced audience size, it also triggers increased advertising costs: when the size of the viewing audience goes down, **the** cost of advertising **as** expressed by cost per thousand viewers (CPM) goes up. **This** cost increase ultimately is borne by **the** American public in higher prices paid for goods and services.

For network advocates who claim that programming in the Golden **Age** of Television during the 1970s and 1980s was generated by three networks — ABC, NBC and **CBS** , they overlook an important fact; during that era, the diverse genres of entertaining and often socially important network programming were produced by independent producers — not the networks who were required by federal regulations to obtain all of their programming from independent non-network sources.

For the four networks — who use auction-free analog and digital spectrum — their economic well-being will not be diminished by the **Commission’s** adoption of the **25%** Independent Producer Rule; they will continue to enjoy exclusive control of all of the advertising revenues generated by 100% of **their** prime time schedules. The four networks would also be able to program **75%** of their prime time schedule with their own programming. The balance of the networks’ prime time schedule — **25%** — would be derived **from** a highly competitive marketplace-driven process

involving dozens of large and small independent producers who once again would have the realistic opportunity to develop and own programming aired on prime time television.

Regarding the sustainability of the content neutral **25%** Independent Producer Rule, the Commission has solid Court precedent to rely upon. As noted in Section IV, the Schurz Court was unequivocal in giving the Commission a judicial green light to adopt a carve out rule like the **25%** Independent Producer Rule. The Schurz Court confirms “the Commission could always take the position that it should carve out a portion of the production and distribution markets and protect ~~them~~ against the competition of the networks in order to foster, albeit at a **higher** cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market would provide. That would be a judgment within the Commission’s power to make.”

The documentation provided by the Coalition for Program Diversity is unambiguous: the narrow prime time television programming marketplace has become dysfunctional as diverse sources of independently produced, non-network programming have been eliminated or seriously compromised by the unregulated major networks.

Based on the irrefutable record before it of the four networks’ anti-competitive and diversity-chilling dominance of the prime time television programming marketplace, the Commission should reject the major networks’ pleas for repeal of both *the* **35%** nationwide broadcast cap and the Dual Network Rule. Instead, the Commission should promote its fundamental goals of program diversity and competition in the prime time television marketplace by adopting the content-neutral **25%** Independent Producer Rule proposed by the Coalition for Program Diversity.

² Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992).

**Before the
Federal Communications Commission
Washington, D.C.**

In the matter of

2002 Biennial Regulatory Review — Review of the) MB Docket No.02-277
Commission's Broadcast Ownership Rules and)
Other Rules Adopted Pursuant to Section 202 of)
the Telecommunications Act of 1996)
)
Cross-Ownership of Broadcast Stations and) MM Docket No.01-235
Newspapers)
)
Rules and Policies Concerning Multiple) MM Docket No.01-317
Ownership of Radio Broadcast Stations)
in Local Markets)
)
Definition of Radio Markets	j MM Docket No.00-244

To: The Commission

COMMENTS OF THE COALITION FOR PROGRAM DIVERSITY

I. INTRODUCTION

In its NPRM in this proceeding, the Commission acknowledged that it “has long regulated media ownership as a means of promoting diversity, competition and localism in the media without regulating the content of broadcast speech.”

The Commission further confirmed that its “ownership policies traditionally have focused on advancing three broadly defined goals: (1) diversity, (2) competition, **and** (3) localism.”

¹ 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Notice of Proposed Rulemaking, **MB** Docket No. **02-277**, ¶ 2 (proposed **Sept. 23, 2002**).

² *Id.* at ¶ 5.

As the Commission undertakes the unprecedented challenge of reviewing all of its broadcast ownership rules, the Commission appropriately has committed to determining whether its regulatory intervention is necessary to advance its fundamental goals of diversity, competition and localism in today's highly consolidated network broadcast marketplace.

Importantly, the Commission further acknowledged in its NPRM that the court in Fox Television, Inc. v. FCC recognized and highlighted the historical significance of diversity and localism in broadcast.³ The Commission, in fact, incorporated the language of the Fox Television decision in its NPRM stating "that in the context of broadcast regulation, the public interest has historically embraced both diversity and localism, that protecting diversity is a permissible policy for the agency to seek to advance...."⁴

With this Commission's explicit confirmation of its commitment to promoting diversity and competition in today's broadcast marketplace, and in view of the court's recent affirmation of the Commission's permissible pursuit of a pro-diversity policy, the Coalition for Program Diversity ("CPD")⁵ urges the Commission to adopt a First Amendment-friendly, content neutral rule that will

³ Fox Television, Inc. v. FCC, 280 F.3d 1027, 1042 (D.C. Cir. 2002).

⁴ 2002 Biennial Regulatory Review at ¶ 14 (citing Fox Television, 1280 F.3d at 1042).

⁵ The Coalition for Program Diversity, currently in formation, includes:

- American Federation of Television and Radio Artists (AFTRA), New York, NY (see Appendix A);
- Carsey-Werner-Mandabach, LLC, Los Angeles, CA;
- Directors Guild of America (DGA), Los Angeles, CA (see Appendix B);
- ~~Marian~~ Rees Associates, Inc., Studio City, CA;
- MediaCom, New York, NY;
- Screen Actors Guild of America (SAG), Los Angeles, CA (see Appendix C);
- Sony Pictures Television. Culver City, CA.

provide the competitive opportunity for independent television producers to gain access for their diverse programming to 25% of the **network's** prime time network television schedule.

In petitioning the Commission for creation of a **25% prime** time television rule for independently produced programming, the CPD documents the following **facts**:

- (1) The narrow, but critically important, prime time television programming marketplace is overwhelmingly dominated by the four major U.S. broadcast networks — **ABC, CBS, NBC and Fox.** These FCC licensed giant broadcast corporations have been granted free analog and digital spectrum that was not secured, **as** with other FCC licensed services, through spectrum auctions. Instead, the networks, at no cost, enjoy **the** exclusive use of this **enormously** valuable spectrum — spectrum that **is** a public resource that **will** continue to increase significantly in value. Ironically, **while** these **four** networks currently control 100% of the prime time television schedule with their largely in-house produced programming, these same four networks, nonetheless, seek additional deregulatory relief from the Commission's 35% national broadcast cap so that they can expand their dominance over the narrow prime time programming marketplace — a marketplace that is critical to **U.S.** consumers -- especially to the 43,411,000 consumers primarily dependent on **free** over-the-air advertiser supported television.⁶

- (2) The prime time television programming marketplace is a **narrow, unique** market

⁶ **See** **MEDIAMARK RESEARCH, INC., FALL 2002 REPORT (2002)**, Copyright 2002.

where programming from other video distribution sources generally cannot be substituted for prime time television programming. Notwithstanding the plethora of video outlets, the four networks' documented dominance of the ~~current~~ prime time television schedule results in less diversity of programming sources for **U.S.** consumers — not more. In this regard, while those advocating the repeal of the 35% cap often refer to the fact that "the Golden Age of Television" occurred during the 1970s and 1980s when there were only *three* networks, these proponents of further media consolidation ignore the fact that during ~~this two~~ decade period, the networks were required by FCC regulation to license all of their prime time television programming from independent producers.

- (3) Since the four broadcast networks and the major Hollywood studios were allowed to merge in the mid-1990s, the once thriving **and** fiercely competitive independent producer community has been dramatically diminished **as** a source of prime time television programming. A decade ago, 68% of prime time television programming aired by the four networks ~~was~~ produced by independent producers.' Today, because of media consolidation, only **24%** of the networks' prime time programming is obtained from independent producers.' Moreover, because there *are* no regulatory

¹See Appendix F, (Coalition for Program Diversity Study ("CPD Study"), *1992-1993 TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992))).

⁸See Appendix D, (CPD Study, *2002-2003 TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER,

safeguards for independent producers in the highly concentrated network-controlled prime time television programming marketplace, the networks now **freely extract** back-end ownership rights from independent producers — producers who typically have little or no leverage to resist network demands if their programming is to be considered for the very limited opportunities to air on prime time television.

- (4) The content neutral **25%** prime time regulatory carve out for independent producers proposed by the CPD will not only advance the Commission's diversity and competition goals. it will also generate increased advertiser support for prime time television. **As** a result, the **25% Independent Producer Rule** will also promote enhanced competition in a more financially robust prime time television marketplace. Importantly, the **25% Independent Producer Rule** will not disadvantage the networks in **terms** of advertising revenues. In fact, the networks would still enjoy exclusive control of all advertising revenues generated from their entire prime time schedule, including ad revenues resulting from the diverse independently produced programming aired during **25%** of the networks prime time schedule.

- (5) **The** content ~~neutral~~ **25%** prime time regulation carve out rule is judicially sustainable. In fact, the 7th Circuit, in Schurz Communications, Inc. v. FCC, specifically supported a regulatory "carve out" for independent produced programming if ~~the~~ Commission determined in its judgment that **such** a regulation

would promote its goal of diversity in the television programming marketplace?

- (6) Based on the documented paucity of programming sources for prime time television, the lack of diverse programming in the prime time television marketplace will only be exacerbated if the Commission grants the four networks relief **from the 35%** cap or relaxes the Dual Network Rule. In any event, the Commission **should** provide the competitive opportunity for independent producers to once again showcase their diverse creative product during at least one quarter of the networks' prime time schedule. Appropriately mindful that the networks' lucrative prime time television schedule is dependent on the networks free use of analog and digital spectrum — spectrum that is a cherished public resource — the Commission must act now to advance its goals of program diversity and competition in the broadcast marketplace **by** requiring the networks to dedicate **25%** of their prime time schedule to programming produced by independent producers.

II. THE NARROW PRIME TIME TELEVISION PROGRAMMING MARKETPLACE

A. The Reality of Current Prime Time Television Programming Marketplace

Since the abolition of the financial interest, syndication and prime time access **rules**, the prime time marketplace **has** become bloated **and** consolidated. **As** the **CPD** Study reveals, the four owners of the major networks have more than doubled the time and number of programs - whether series, miniseries or one-shot - they own in prime time at the expense of independent producers who

⁹Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992).

now own only 17 hours on the four major network's weekly schedule.' Compare this number to the 47.5 hours that the independent producers owned just a decade ago." And the negotiating tactics have become more bold and brazen.

Initially, the networks demanded that the Term of ~~their~~ license on a series be increased from the traditional four seasons (five in the case of a Winter or Spring start) to six or more seasons, and without offering the supplier/packager any increased license fees or other consideration. When some of the suppliers rebelled against such measures, the networks became even more strident. Henceforth, they announced or whispered that virtually all the series in prime time would have an extended or even perpetual Term and the network would own (1) a piece of the "action" (or backend) in consideration of permitting access to the network's airwaves, or (2) a "partner's" piece (50%), in consideration of which, the network would put up half the production deficit (but not half of the term deal cost for the major talent in question), or (3) the supplier should come "in house," so that the network or its affiliated production company would own all of the copyright in the show.

The supplier's equity would be converted from ownership to revenue sharing only after the network production company had recouped its (inflated) costs of distribution, production, financing, and overhead. Suppliers succumbed, unless they were historically in the production/distribution business and had access to public capital and had a popular series then on the air, which, coupled with the ability to derive continuing library income, kept them afloat. Companies independent from

¹⁰ See Appendix E, (CPD Study, *2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW* at 5, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, *Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season* (Oct. 2002))).

¹¹ See Appendix G, (CPD Study, *1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW* at 3, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, *Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season* (Sept. 1992))).

motion picture/television studios essentially gave up and either merged or went out of business. Even an entity as strong and well financed as Columbia/TriStar (now Sony Pictures Television) ceased production of new prime time series.

B. The Need For a 25% Independent Producer Rule

At the same time as the grabs by the networks for longer term and increased ownership, the networks put the brakes on funding the ever more expensive production costs of series. Where historically, through negotiation between relative equals during much of the 1970s and into the 1980s, the networks supplied greater than 70% of production costs, in the 21st century, networks are unwilling to fund over 60%, thereby creating deficits of as much as \$500,000 per episode for sitcoms and up to and over \$1 million an episode for an hour drama or action adventure show. An independent company, even those like Columbia/TriStar who has access to outside equity funding, could not keep pace, faced with increased deficits on the "front end" and with diminishing abilities to garner deficit recoupment from international sources, let alone domestic post-network exploitation.

To foster new investment in the prime time network business, it is essential to assist those who might wish to ask capital to have access to the network's airwaves, without being coerced through the newly developed post-FinSyn tactics.¹² Thus, after a short transition period, a major network (i.e., an over-the-air network with 95% or more NTI and with greater than a 4.0 Household Rating) would be required to order at least 25% of its prime time programming from an "Independent Producer(s)." This rule would add important and serious "voices" which presently are in danger of extinction because they do not own a major network. The Independent Producer could

¹² See *infra* at 15 for a brief discussion of FinSyn.

not effectively leverage a major network in any case OTHER THAN when it controls a valuable, popular series or other program, thereby benefitting the public and augmenting its stature. Diversity of source would be enhanced, competition would thrive, the public would be well-served.

C. The Definition of an Independent Producer Under the 25% Rule

An Independent Producer is defined **as** an entity other than one which is affiliated with a major network (**as** stated above). Under such a rule, a major network can order **75%** of its prime time schedule (computed on a semi-annual basis) “in house” or from owner(s) of other major networks. And in computing the 25%, any time periods devoted to motion pictures initially theatrically released would not “count.” Thus, if a major network like NBC regularly scheduled two hours a week for theatrical motion pictures to be exhibited on its airwaves, the denominator in *the* equation would be 20, rather than **22**, hours, so that five hours would have to be ordered and exhibited per week to meet the 25% Independent Producer Rule.

To be sure, some of the beneficiaries of this rule today would be the studios who do not **own** major networks, and one could well argue they need no incentive or help from the Government. But this overlooks the fact that non-studios, such as Carsey-Werner-Mandabach or Halmi (Hallmark) Productions would also be eligible and/or incentivized for investment and creativity, **as well as the** fact that new voices would likely grow and be heard in the future. And to assure their upside potential, the 25% Independent Producer Rule must also require that the network be barred from taking a financial interest or domestic syndication rights in the program, in order to qualify for the 25% set aside. Obviously, there is a quarter century of precedent for such rule. Otherwise, the separate and independent voice so necessary to achieve not only diversity of source but diversity of ideas would dissipate.

There is also the argument that cable networks and “weblets” should be treated like major networks and that these networks have reduced major network share and influence. However true this argument might have been in the Schurz case and era, the facts today are clear. The programs on the major networks’ dominate the ratings, not only in their initial exhibition window, but thereafter. No one can point to more than a handful of series - if any - which successfully ran in domestic syndication after initially airing on a weblet or cable network. Quality is quality, as seldom as achieved today, and all successful sitcoms aired on a major network to start.

Finally, one would ask why 25%, rather than 10% or 50% or other number? The proposed rule and percentage: (1) gives effect to a major network’s need or desire to produce in-house in quantities which could arguably achieve economies of scale, (2) incents independent producers to stay in business, or perhaps more importantly start in the television production/distribution business with enough shots to be able to achieve success, and (3) it is a reasonable compromise between conflicting forces present in today’s marketplace. In reviewing the attached Appendices, one would readily discover that, if the rule were in effect today, NBC would already qualify and ABC would be “borderline” qualified. So, the proposed percentage could work today for two of the four major networks. To require less would effectively disincent newcomers from appearing on the prime time scene, let alone cause existing participants to be even more wary of their diminishing role (as was Columbia/TriStar).

III. THE ADVERTISING MARKETPLACE FOR PRIME TIME TELEVISION PROGRAMMING

A. The Advertising Industry's Potential to Advance the Commission's Goals of Program Diversity and Competition in the Prime Time Television Programming Marketplace

It is incumbent on the FCC to consider the advertising market and how it operates when changing broadcast regulation. The reason is quite simple; without an eye to the economic engine of the industry, there may be unintended consequences of regulatory change that are disruptive to the Commission's basic policy goals. **This** has happened to past Commissions in the case of Children's Television and the Prime Time Access Rule.

Conversely, an understanding of the advertising market can be used by the Commission to foster regulatory policies that will advance the Commission's policy goals of diversity and competition in the prime time television programming marketplace. In this area, the advertising industry directly helps the FCC achieve the three important Commission goals of competition, localism, and diversity in the broadcasting marketplace. The fact that the advertising market substantially helps maintain a thriving broadcast marketplace is best demonstrated by recent data that confirms that even in the weak advertising market from November 2001 through October 2002, advertisers spent \$11,198,814,000 on the six networks over-the-air prime time television programming alone."

Importantly, this advertising is placed by a wide range of advertisers for a diverse variety of products. During that same 12 month period, the prime time network advertising was placed by 682 different companies that advertised 3,478 different brands.¹⁴ Each of these brands has different sets

¹³ See COMPETITIVE MEDIA REPORTS, Nov. 2001 – Oct. 2002, Copyright Dec. 2002.

¹⁴ See NIELSEN MEDIA RESEARCH, Copyright 2002; NPower.

of potential and current consumer; who have different tastes in television viewing. These differences vary dramatically between age, sex, income level, marital status, occupation, household size, geographic dispersion, education level, and language to attributes such as trend setting, active, worried, short of time, family oriented, adventurous, *et cetera*.

As the Commission regulates the television industry, it must fully appreciate the reality that advertisers need to market to our diverse Nation of consumers. Fundamental to the Commission's decision-making process is the overlapping and immediate concerns of both advertisers and American consumers who rely on free over-the-air television. It is imperative to the mission of free television that advertisers reach every household nationwide, regardless of income, race or culture. Importantly, the contrast between households that can afford to pay for cable and satellite subscriptions is staggering when compared with households that only have access to free advertiser supported network programming. Cable and Satellite households have a median income of \$51,375 while the 43,411,000 consumers who do not have this luxury have median incomes of \$26,588.¹⁵

Based on a purely economic analysis, broadcast advertising is essential for advertisers who must factor the necessary cost of broadcast advertising into the normal course of business. Thus, advertisers are not only impacted by changes in the broadcast industry, they must react to Commission decisions that ultimately impact consumer costs for products. Advertisers, and ultimately, American consumer, are significantly affected by FCC actions that at first glance, may seem outside the FCC's purview.

To understand how the Commission's actions – or lack of regulatory action, can impact the advertising industry as well as consumers, FCC officials must understand the fundamental workings

¹⁵ See *id.*

of the advertising industry. A primary reality is the fact that the advertising industry measures costs per thousand viewers ("cpm"). "Cpm" is defined as the desired audience viewing a program and thus watching the ad being run. Essentially, broadcasters charge advertisers per unit of advertising space divided by the number of viewers for that program. The "cpm" is thus affected by the price the broadcaster charges and changes with the size and makeup of the audience that watches the Program.

The broadcast industry presents an interesting economic situation. While the broadcaster typically owns and controls the makeup and presentation of a program, the broadcaster sells that program's audience to advertisers. Although ownership of a program never leaves the broadcaster's control, the final product of the program – the show itself – greatly affects the audience size and draw, and thus affects advertisers. As a result, when programs aired are bland, monotonous and similar in style, theme, and format (as has become the unfortunate pervasive reality of shows produced from the same source), advertisers become crippled in their ability to reach the widest variety of our Nation's diverse population. Accordingly, the market suffers as the widest range of products fail to reach the most diverse range of the viewing public: and as a result prices, naturally, rise.

Thus, the regulatory environment's effects on advertising costs of broadcast advertising per unit and its effects on the audience delivery of programming determines the advertiser's cost of doing business; ultimately, it also impacts the American public's cost of goods and services. This is both a problem and an opportunity for the Commission.

At times, due to the economic actions and reactions of the advertising marketplace, the FCC's regulatory actions – or inaction – in one area have affected FCC policy in another. Prime

time network television has been a primary example of the problem in the past, yet it is an area where the Commission has a tremendous opportunity to advance its policy goals in the future.

Better programming attracts larger audiences. The FCC's **OPP** Working Paper 37 points out that "[t]he jump in subscription revenues for advanced analog and digital services attests to the value subscribers apparently place on expanded programming choice."¹⁶ It is obvious that the American public also puts a value on the degree of diverse programming choices provided by over-the-air television networks (although that value is paid to the networks on the viewers' behalf by advertisers.)

American viewers who depend on free broadcast television desire diverse television programming. While the Commission, in its Omnibus Broadcast Rulemaking, seeks to promote program diversity, it could inadvertently cause a deleterious impact on diversity unless the Commission gives appropriate consideration to all relevant aspects of the prime time programming marketplace. In this regard, based on the reality of cross-ownership today, the same companies are creating, producing and airing similarly themed shows in the prime time television marketplace. Because the networks own, operate and control these programming sources, the networks now are committed to generating profits from less diverse, lowered rated programs — programs that immediately air on their co-owned cable affiliate. This "repurpose" of the same show has resulted in decreased diversity for a broader audience across both network broadcast and cable. Not only do advertisers and marketers suffer because of this drive to maximize profits by simultaneously utilizing as many venues owned by the networks to air the same programs, the American people also suffer

¹⁶ Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, **OPP** Working Paper Series 37, at 45 (Sept. 2002).

because **advertisers** cannot fully market diverse products in bland, monotonous programs. **Although** the recent FCC Study entitled Program Diversity and The Program Selection Process on Broadcast Network Television (“Study 5”) claims that diversity still exists in the current programming scheme, the substance of Study 5 proves contradictory.”

Under the Financial Interest Syndication Rule (the “FinSyn Rule”), networks licensed programming from producers (in essence, they rented the raw materials of their business) and the networks **then** sold the audience to the programs to advertisers. **The** networks realized handsome profits **as** they kept all advertising revenues after paying the rental to the producers generated through selling ad space. Importantly, in the FinSyn era, the network program executive’s primary job was to pick the “best” **program** and the best program typically **was** the independently produced program that attracted the largest or most saleable audience and delivered the *highest* margins.

In 1993 FinSyn sunsetted. Production studios - and independent producers who often collaborated with the studios - routinely became wholly owned divisions of vertically and horizontally integrated networks. In this new unregulated environment, the networks argued that they would always put on the “best” programming as the “...incentive [to use in-house produced programming] continues to be tempered by networks’ competing incentive to attract audiences by selecting the ‘best’ program irrespective of source.”” Sadly for American viewers **and** advertisers, due to the deregulatory change in the economics of *the* prime time programming marketplace, the networks changed the **meaning** of the word “best.”

¹⁷ See Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity (Sept. 2002).

¹⁸ **Id.** at 3.

The new meaning of “best” is now driven by the networks’ desire for the largest possible profit ~~margins~~ across all airings of all network co-owned (as opposed to previously network rented) programming across all co-owned broadcast outlets. Study 5 lists many examples and quotes that prove ~~this~~ fundamental change in the industry, but perhaps the best ~~was~~ made by Ted Harbert, former President of ABC Entertainment responsible for selecting network programs, who is currently the President of NBC Studios:

Michael Eisner is saying okay ABC [and Disney] everybody just get together in the same room and do it together. I *think* their [Disney’s] shows will get on the air. That isn’t going to mean that they’re better. If you put the network person in charge of both sides of the fence, saying, ‘Okay, you’re in charge of the studio side and you also have to...choose the shows as the network person that go on the air.’ It’s impossible to ask the network person to have that much objectivity. To be able to ~~look~~ at the show they’ve been developing ~~from~~ the very, very beginning and say, ‘Oh, no what I’ve just been ~~working~~ on personally, that I’m personally invested in ~~from~~ the very first moment with the writer, gee that’s much lousier than the Warner Brothers [sic] show. I’m gonna go with ~~the~~ Warner Brothers [sic] show.’ I *just think* it’s a virtually impossible thing to ~~ask~~ the people.”

In the early 1980s, John Kluge owned the Metromedia station group (now Fox Television). His creative and innovative programming strategy lowered his network costs by uniting other local stations to air ~~the same~~ program at the same time. He then could sell national advertisers commercials on a network basis, retain for local ~~sale~~ several of the commercial slots and substantially reduce the cost of programming at all of his stations. While his programming ideas failed to have traction in that market his concept, nonetheless, remains viable today.

Today, the networks retain 100% of their advertising revenues ~~from~~ their *prime time* television schedule. And even with the Commission’s adoption of the **25%** Independent Producer

¹⁹ *Id.* at 16.

Rule proposed by the CPD, the economics would remain the same and networks would profit **from** increased revenues gained through increased advertiser support, including more local advertising **on** their locally owned stations.

The networks new ability to immediately “repurpose” their programming on co-owned cable networks allow the networks to enjoy inflated revenues on a single show without spending additional funding to create the show. Because the networks own their programs, they have an **enormous** economic incentive to **use** their “repurposing” ability to immediately distribute the programs **on** co-owned cross-platformed basis. In essence, networks are now, more than ever, cheating viewers of diverse programs by flooding the market with similarly formatted and similarly themed shows that co-opt the prime time market **from** other more diverse programs – admittedly, for *the* sole purpose to “aggressively **seek** out new ways to increase **revenue** and decrease costs.””

Despite the network’s aggressive **use** of various delivery venues to air redundant programming, the networks do not suffer any losses on the original network airing of the programming. As Randy Falco, President of NBC Television Network recently confirmed when speaking about NBC’s prime time schedule, “Most of those [22] hours, particularly for NBC, are very profitable.”*

Obviously, in a marketplace driven in large part by economic considerations, *the* networks have a right and a duty to shareholders to generate profits. But there are other important policy considerations beyond simply maximizing corporate profits. In **this** respect, **the FCC’s** concern should **not** be **how** much profit the networks generate. **The** fundamental FCC concern should be how

²⁰ *Id.* at 2.

²¹ Doug Halonen, *ABC Asked to Reduce Prime Time*, *Electronic Media*, Dec. 2, 2002.

much diversity is provided to the American people in the entertainment and information programming consumers receive on the free public airwaves that the networks use.

As David Barren, CEO of Hearst-Argyle Television said, “The networks are overprogramming the schedule. There is too much duplication.”²² In fact, Study 5 acknowledges the network’s overprogramming and lack of diversity in its section titled “Blanding the Landscape.”²³

Advertisers are very concerned about the lack of diversity and program differentiation in prime time network television. The economic drivers caused by the riptide of the confluence of vertical and horizontal cross-ownership fuels the networks’ fixation on wringing every possible high margin cent from their owned programs and creates a certain sameness to the programming and the audience that will watch it. By fixating on the risk across all of the network owned venues, the network’s myopically embrace the broadest, most common programming that can “play” anywhere. This network induced blandness is the root cause for the shrinking audience size of prime time television. As noted earlier, if the audience goes down, then the cost of advertising (as expressed by cost per thousand viewers) goes up. This cost of doing business is inevitably passed on to the American public in the prices of the goods and services that they consume. If the networks continue on this unregulated path, the American consumer will pay significantly more as advertisers must compensate for smaller audience sizes and therefore, increased costs.

²² Dan Trigoboff, *Barrett: Less Could Be More*, Broadcasting and Cable, Dec. 2, 2002, § D2 at 2.

²³ Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 45 (Sept. 2002).

Even more troublesome, the similarity of programming and program audience delivery has automatically limited advertising access to certain segments of the American population, because the television networks do not program to those diverse populations. It is almost as if the networks have gone from broadcasting to “broadest casting.” In today’s unregulated prime time television programming marketplace, network officials apparently have come to believe that it is ever more difficult to introduce (and thus, there is a lower incentive to develop) new products that could improve quality of life, due to the continued diminishment and blending of program audiences. Consequently, marketers are stifled in their ability to create products that serve diverse segments of the population, and those diverse Americans’ needs are not met because the products that benefit their lifestyles are neither actively made nor successfully distributed. Marketers and advertisers need diverse audiences to whom to target diverse products. When the bland programming and small, non-diverse audience size limit marketers and advertisers, everyone suffers, except, of course, the networks that cut costs by “repurposing” the same program in another co-owned venue.

Advertisers’ longstanding complaint to the networks continues to be about the network’s stubborn insistence on targeting programs to an audience that is 18-49 years old without any regard for the multitude of differences both within and outside of that limited demographic definition. This intransigence by network officials is particularly misguided since there are almost 3,500 brands advertised in prime time that should be reaching countless diverse target audiences. Further, the proper advertising environment is different for each brand. Accordingly, it is frustrating to advertisers that at my given point in time under the current unregulated network framework, there is a remarkable duplication not only in audience but also in look and feel of the programming that advertisers are asked to support.

Perhaps that **is** because, as OPP's Working Paper 37 points out, the networks are spending a significantly lower percentage of their revenues from advertising on the raw material that **is** the dominate genre of prime time programming – network “in-house“ programming. According to the Working Paper, the networks spent 30.3% of their advertising revenue on programming in 1994 but only 26.3% in 2000.²⁴

The situation is so stultifying that a group of advertisers **actually** got together and formed the “Family Friendly Forum” – an organization that has funded script development for programming that **was** better suited to their desired audience. The fact that major U.S. advertisers had to take it upon themselves and advance their own dollars to develop diverse, quality prime time television programming because the networks would not, confirms the dismal state of network prime time programming. Unfortunately, the record also confirms that the FCC's deregulation of the broadcast industry fostered the current crisis situation of diminished program diversity.

Importantly, in the case of the Family Friendly Forum's programming, the networks still insist on owning the rights to Family Friendly programs through all facets of that programming's distribution. Incredibly, the networks only agreed to refund the money spent by the Family Friendly Forum for script development if the networks “pick up” the show. In other words, the networks are so risk-averse because of their current state of vertical and horizontal cross-ownership, which guarantees them profits, that they still only embrace diverse Family Friendly Forum programming concepts when they can be assured of maximum profits. Clearly, the networks also do not listen to the public's desires for more diverse, **quality** prime time programming, for **if** they did they would

²⁴ Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, OPP Working Paper Series 37, at 132 (Sept. 2002).

commit resources to **seek** out much needed diverse programming without the advertiser challenge that successfully drew viewers to programs created by the Family Friendly Forum.

As the FCC balances the network's pleas for further deregulation with the Commission's goals of fostering more diversity, localism and competition, the Commission must embrace the concept of a prime time carve-out in which the networks would be required to air **25%** of their prime time schedule with programming from independent producers. Study **5** provides compelling proof for the Commission that this **25%** independent producer carve-out would enhance the current level of program diversity by freeing network programmers from the debilitating economic **constraints**.²⁵

As Matt Williams, producer of *Home Improvement*, said in the Study 5:

I believe the best creative work always happens when there **is** a creative tension. It **used** to be, studio executives would go into the network and they would fight like hell because they had ownership of this show, literal ownership, but also they felt proud about a show they would beat the shit out of the network to **get their** show. How do you do that when it's the same company? And so what usually happened is out of that tension there was always a better show evolving where you challenged each **other**.²⁶

If the programming in the carved out periods is given equal support and attention by the networks, it **will** have at **least** equal success rate to their current programming. But as suggested by Matt Williams, network executive Ted Harbert and others in Study **5**, this independently produced **programming** is likely to have an even better success rate. Following the adoption of the **25%** Independent Producer Rule, the networks will soon realize that diverse programs are far more

²⁵ See Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity (Sept. 2002).

²⁶ *Id.* at 29.

profitable than the current bland programming that is the unavoidable by-product of the current vertical and horizontal ownership regulatory environment.

The 25% Independent Producer Rule would also promote diversity in other areas where the public airwaves are used. Part of the reason for the “blanding of the landscape” is the fact that the networks now make the same programs available everywhere at once. Study 5 correctly points out that syndication in the non-network time periods over broadcast stations is now happening simultaneously as network’s use a multiple exposure strategy to maximize profits from the same programs.

... networks have begun selling shows into broadcast and cable outlets at the same time even at the risk of reducing viewership of newly-produced episodes of *that* show. Ted Harbert explains [that] “networks ... can’t wait to get a show that they have into syndication to a fault. They want them out there so quickly to ~~try~~ and reap some revenue. ... As [Steve] McPherson [President of Touchstone Television] explained it to me, a show goes into syndication “whenever that distribution entity feels that it can take advantage of the asset in the most productive way.””

This strategy to maximize network profits at the cost of diverse, quality network produced programming unfortunately also costs the American public, who has the same program in different time periods, as opposed to the preferable opportunity, where the viewer has access to different and diverse programming at all times of the day.

In defending their multiple exposure strategy of fewer programs available simultaneously in more markets, the networks speciously argue that it is in the public interest because they are making the programs available at various times when the public would want to see the programs. However, it is well established that the public already has this opportunity through the almost universal

²⁷ *Id.* at 34-35.

ownership of VCRs which allow consumers to repeatedly access network programming; **this** VCR capability is also becoming augmented for much of the public through the use of TiVo, a **technology** now being installed in a rapidly growing number of set-top boxes and directly in TV sets. **Importantly**, the **25%** Independent Producer Rule would create an environment where the networks could use their prime time schedule to provide **an** enhanced mix of programming to the American public who, **through** technology, can then decide when to watch these programs.

The networks also argue, with little credibility, that they need this immediate programming double-dip because they are losing audience share to the cable networks. **When** making that argument, the networks obfuscate the fact that they are also **among** the most successful cable companies. Michael Eisner (Chairman **and** CEO, Disney), in a controversial Wall Street speech, confirmed that ESPN and the cable operations are vital **to Disney**.²⁸ Eisner's failure to **mention** ABC **as** also being important to the corporation, sent shockwaves through the ABC affiliate body; it should also have upset lower income **Americans**, who make up **20%** of our population, but **who** do not have cable or satellite services. These citizens are the special demographic audience most adversely impacted by the network's inordinate fixation on **the** profits and the alleged economic efficiencies that the networks enjoy when airing low budget in-house network developed prime time **programming**.

Because there **is** no **25%** Independent Producer Rule, the networks co-ownership of cable has created **an** even further decrease in diversity of programming available **to the** American public. **As** Study 5 also **reports**:

²⁸ Christopher Grimes, *Eisner Pledges Rebound in Disney Profits By Next Year*, Financial Times, Oct. 2, 2002, at Front page.

In addition to accelerating the traditional point for selling programming into syndication, networks are attempting to reap more immediate financial benefits on shows they own by repurposing them on cable networks **An** example of this is *Alias*. **This** program **is** produced by Touchstone. airs on ABC on Sunday night and repeats later in the week on ABC Family. Fox also did **this** with **24** when it aired its original show on a Tuesday night and then repeated that **same** episode twice on the FX channel within one week of its initial broadcast airing.”

The networks’ current cross ownership strategy has created **a** troublesome reality of less diverse prime time programming for U.S. viewers of network television. The reality of three hours per week being programmed with repeated episodes **is** an unintended consequence of the current regulation-free environment that will be exacerbated with further network deregulation. The **25%** Independent Producer Rule would limit, if not prevent, the diminished diversity caused by cross ownership or the undesirable further relaxation of the 35% broadcast cap.

There are those network officials who argue that without cross ownership, independent programming could not get produced. They argue that producers need the co-financing of the **networks**, **as** there is no market for independent producers to finance the deficits. In reality, there is **very** limited independent television financing at this time because few, if any, financial institutions would risk capital when there is no guaranteed return; and regrettably there **is** no guaranteed return, **primarily** because there is little left **after** the network takes out its ownership percentage for allowing **a program** to air **on** the network’s prime time schedule. With the **25%** Independent Producer Rule, the current anti-competitive network dominated situation would change, **and** new and **significant** sources of deficit financing would reappear for television produced by independent producers, **who**

²⁹ Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 36 (Sept. 2002).

would retain the ownership **rights** in their programming airing on the **25%** of the network's prime time schedule.

The current state of technology and commercial viewing habits of the public are also troubling to advertisers. "28.6% of the audience stop(s) watching television or switch away to another channel" according to the Advertising Research Foundation.³⁰ TiVo users currently skip 88% of **commercials** when viewing prerecorded, time-shifted programs." **The** situation is so dire that **Mel Karmazin**, CEO of CBS's parent, Viacom, threatened to "[t]urn CBS into a pay network" at the CSFB analysts meeting on December 9, 2002. In addition, Disney and **Fox** are currently testing subscription video on demand for network programming with and without **commercials**.³² **Not** only does this network strategy further exacerbate the "always available" aspect of current programming, it could ruin the very underpinnings of the advertiser financing of broadcast television – a medium particularly vital to the needs of those **43.4** 11,000 Americans who do not or **cannot** pay for cable/satellite services.

In an interim step, the networks have been selling increased numbers of integration of product messages into the programs. This **is** made possible by the networks' unregulated common ownership of production and broadcast. Unfortunately, only the largest advertisers can afford this **integration**. Smaller advertisers **and** brands they represent are left out in the cold. It is also **arguable** that with program/advertising integration, advertisers can intrude into the programming development process – and ultimately the **quality** of the programs could be diminished by the potential of

³⁰ Lex van **Meurs**, *Zapp! A Study of Switching Behavior During Commercial Breaks* (Journal of Advertising Research), Jan./Feb. 1998, at Conclusion (available at <http://www.arfsite.org>).

³¹ Michael **Lewis**, *Boom Box*, **N.Y. Times**, August, 12, 2000, § 6 (Magazine), at 36.

³² R. **Thomas Umstead**, *Fox To Launch Action Sports Network*, *Multichannel News*, Dec. 9, 2002 at 6.

inordinate advertiser influence. Should **this** be the case, a **25%** Independent Producer Rule would limit the potential of intrusive content control since both the independent producer and the network would have to agree **on** every facer of the integration. Unfortunately, in the current environment where the networks absolutely control 100% of their prime time programming, the “creative tension” inherent in **an** independent/network relationship is non-existent. In short, the networks have total control, and these four mega-corporations who use free spectrum **can** do whatever they want to generate maximum profits with no requirement to maximize diversity on their prime time schedule.

For advertisers, it is an accepted tenet throughout the advertising industry that viewers are more attentive to commercials in programs that they care about.” It is hard to care about redundant programming that is very similar to everything else on the air. **This** is particularly **true** when a **program is** aired repeatedly and in rapid succession **on** several different co-owned network delivery **systems** – whether broadcast or cable. With the Commission’s adoption of the **25%** Independent Producer Rule, more diverse programming will be created that will appeal to the diverse viewer tastes of the American public. Importantly, this independently produced programming would be aired in **patterns** that would help recreate the “specialness” of the medium. For the U.S. advertising industry, that “specialness” can lead to more interest **in** the commercials aired **in the** programs.

When programming is unique, different, and appealing, audiences grow. That reality is constantly proven time and again. A **25%** independent producer *came* out rule would create a situation where there is **an** increased diversity of programs that attracts increased diverse audiences. **This, in turn,** would generate more enthusiastic **advertiser** support. Without the **25%** Independent Producer Rule, the programming differentiation and audience size and diversity will continue to

³³ See Report Proves Loyal Viewers Watch More Ads, The Meyers Report (Sept. 29, 2000).

seriously diminish. If programs continue to be monotonous, viewer support will continue to **shrink**. Due to the economic nature of television advertising, and the fact that advertisers **pay** for **audience**, the advertisers will pay more in **cpm** even if the cost **per** commercial **stays** constant, **This** will have the effect of pressuring the broadcasters to add ever more commercials to keep their revenues **up**, **which** explains why clutter has escalated so much since the FinSyn Rules were abolished. **In turn**, audiences will continue to diminish and broadcasters will be economically unable to serve the broadest percentage of television viewers.

It is clear, in both the advertising trade publications and in Study 5, that advertisers are clamoring for better programming, **as** they are virally interested in the **range** of audience delivered to that **programming**. The long-term viability of the broadcast **system** is based on **this** dynamic. **Advertisers** have a diverse list of brands with diverse audiences of potential customers, and **advertisers** desperately need diverse genres of **quality**, diverse prime time television **programming** to grow the **audiences** that will view advertiser supported network television.

If the Commission fails to adopt this **25%** Independent Producer Rule, not only will the advertising community be forced to increase its payments to the networks, but more importantly, the American consumer ultimately will bear the financial burden **as they** (the Consumers) will bear the increased costs for the price of products and services they use. If left to a television marketplace with little broadcast ownership **outlet** regulations, without a concurrent governor to a certain marketplace economic drive through the FCC goals, prime time programming advertising will continue to diminish, and the American consumer will pay more. **That is**, unless the **FCC** intervenes to ensure **and** promote the Commission's fundamental goals of diversity, localism and competition in the prime time marketplace.

IV. THE JUDICIAL SUSTAINABILITY OF THE 25% INDEPENDENT PRODUCER RULE

The Commission's long standing fidelity to promoting its bedrock goal of program diversity **has** been repeatedly upheld by Federal Courts which **recognize** the Commission's need for appropriate regulatory flexibility in pursuing what the FCC concludes is in the public **interest**. While the Commission repeatedly acted to promote its essential goal of diversity in all aspects of **broadcasting** — including television programming — the **courts** have reviewed the Commission's actions and given the Commission broad flexibility to reasonably regulate broadcast licensees in a manner that the Commission determines will promote diversity, competition and localism.

As the Commission conducts this Omnibus Broadcast Rulemaking — particularly its focus on networks' request for elimination of the 35% national broadcast cap and elimination of the **Dual** Network Rule, the Commission must give serious consideration and appropriate weight to the irrefutable documentation that the current prime time television programming marketplace is **overwhelmingly** dominated by the four networks — **ABC**, **CBS**, **NBC** and **Fox**. Based on this anti-competitive, diversity-chilling programming reality, the Commission has ample court precedent to adopt the **25%** prime time television carve out **rule** for independent producers — producers who would, if provided the opportunity, compete vigorously to have their diverse, non-network controlled programming air for consumers who rely **on free**, advertiser supported network television.

In Schurz Communications, Inc. v. FCC, the Seventh Circuit Court of Appeals, while vacating the **FCC's** decision regarding a modified FinSyn Rule, confirmed that "the Commission could always **take** the position that it should carve **out** a **portion** of the production and distribution markets and protect them against the competition of the networks in **order to** foster, albeit at a **higher**

cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market would provide. That would **be** a judgment within the Commission's power to make.'"

Clearly the Schurz Court acknowledged the wide discretionary authority fundamental to the FCC's conduct when regulating broadcast licensees in a manner that the Commission believes will promote diversity. While the Schurz Court ruled **against** the Commission for failure to properly consider the entire record in that case, the Seventh Circuit, nonetheless, reaffirmed and emphasized the Commission's duty to promote diverse programming.³⁵

Regarding diversity, the Schurz Court concluded that "the Commission's concern, acknowledged to be legitimate, is *not* just with market power in **an** antitrust sense but with diversity, **and** diversity **is** promoted by measures to assure a critical mass of outside producers **and** independent stations."³⁶ **Thus**, even though the court vacated the FCC's remaining FinSyn rules in **1992**, the court confirmed that the Commission can legitimately adopt measures to promote diversity when it reasons **from** the record that its diversity goal will be advanced.

The Schurz Court further concluded that "even if the networks had zero market power, the Commission might in the discharge of its undefined, **uncanalized** responsibility to promote the public interest **resmt** the network's programming activities in order to create a **more** diverse programming fare.'" **Thus**, the Schurz Court, far from restricting the regulatory activities of the FCC when the Commission seeks to advance its goal of promoting program diversity, explicitly

³⁴ Schurz, *supra*, 982 F.2d at 1049.

³⁵ *See id.*

³⁶ *Id.* at 1050.

³⁷ *Id.* at 1054.

endorses that function.³⁸ Importantly, unlike the case of the modified FinSyn rules of 1992, the Commission, as part of its Omnibus Broadcast Rulemaking, now has before it in this proceeding, a solid and unambiguous record that confirms that the four networks now dominate the prime time television programming schedule that is so vital to millions of U.S. consumers — including those 43 million consumers who have no access to pay services.

Importantly, Study 5 concluded that “[y]es, there has been consolidation in the production side of the [prime time television] business. Yes, the networks — whether we are talking about three, four or six — now account for an overwhelming majority of the programming that appears in prime time.”³⁹

While acknowledging the serious diminishment of the prime time television programming sources which resulted from network consolidation, Study 5 glibly makes the unsupported - and unsupportable - conclusion that the networks’ overwhelming control and ownership of programming for their prime time schedules has little impact on the diversity of prime time television programming.“ On this fundamental point, it is simply counter-intuitive to conclude, as Study 5 does, that the prime time television viewing public would not have access to more diverse prime time programming if 20, 40 or 100 independent producers were added to the mix of programming sources now dictated for the viewing public by four — and only four — network executives responsible for 100% of the networks prime time schedule. Study 5’s credibility is further called into question when it concludes that “this paper finds such [consolidation of prime time television

³⁸ See *id.*

³⁹ Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, Appendix at 36 (Sept. 2002).

⁴⁰ See *id.*

programming sources into only four networks] **has** not had a meaningful effect on the diversity of content.'⁴¹

Despite **this** sweeping conclusion, Study 5 states that "the extent to which purely economic considerations affect program diversity on broadcast television cannot be determined with any precision.'⁴² Simply stated, Study 5's author admits that it is impossible to fully measure the impact of network consolidation and the resulting diminution of diverse programming on the networks' prime time schedule. Based on **this** compelling admission, the Commission must look to objective factors and conclude, **as** the CPD argues, that it is reasonable to expect that there will be more diverse prime time television programming if the Commission adopts a **25%** Independent Producer Rule that allows independent producers to compete to *air* their programming **on 25%** on the current prime time television schedule — a schedule that is **overwhelmingly** dominated by network owned and produced programming.

Unlike **the Schurz** Court's criticism of the FCC, more than a decade ago, for its failure to appropriately consider the record before it, the record before the FCC today is clear, compelling and unequivocal **on** the key point: the networks dominate prime time television programming with their in-house produced programming. Based **on this** reality, even acknowledged in Study 5, the Commission **has** a record upon which to reasonably conclude that the current network produced programming available to **US. consumers** **is** likely to become more diverse if independent producers **are** able to become additional non-network sources of prime time television **programming** because of the **FCC's** adoption of the **25%** Independent Producer Rule.

⁴¹ **Id.**

⁴² **Id.** Appendix at 37.

In considering CPD's request for the 25% Independent Producer Rule, the Commission need only look for guidance to its own words in its September 12th NPRM; there, the Commission noted that the D.C. Circuit in Fox Television held that "in the context of broadcasting, the public interest has historically embraced both diversity and localism, that protecting diversity is a permissible policy for the agency to seek to advance. . . ."⁴³

Similarly, in Rust v. Sullivan, the U.S. Supreme Court ruled that federal regulators, implicitly including the Commission, were entitled to use broad flexibility in discharging their regulatory functions.⁴⁴ When considering radical changes confronting regulators, the Rust Court held that "[a]n agency is not required to 'establish rules of conduct to last forever,'⁴⁵ but rather must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" While the factual basis for the Rust decision is unrelated to the current situation of extreme consolidation in the network dominated prime time television marketplace,⁴⁷ the Commission currently is confronting radically changing circumstances in the consolidated broadcast marketplace that it regulates. These radical changes have been triggered in large part by the extreme and rapid consolidation in the U.S. broadcast programming marketplace following the elimination of the FinSyn Rule and the subsequent broadcast deregulation mandated by the 1996 Telecom Act. Accordingly, the Supreme Court's endorsement in Rust of the basic concept of regulatory flexibility to adjust to changing

⁴³ 2002 Biennial Regulatory Review at ¶ 14 (citing Fox Television, Inc. v. FCC, 280 F.3d 1027, 1042 (D.C. Cir. 2002)).

⁴⁴ See Rust v. Sullivan, 500 U.S. 173 (1991).

⁴⁵ Rust, 500 U.S. at 186-187 (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co. 463 U.S. 29, 42 (1983) (quoting American Trucking Assns., Inc. v. Atchison, T & S.F.R. Co. 387 U.S. 397, 416 (1967))).

⁴⁶ Id. at 187 (quoting Motor Vehicle Mfr. Assn., supra, 436 U.S. at 42) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

⁴⁷ See generally Rust, 500 U.S. 173 (1991).

circumstances **is** relevant to the Commission's deliberations when considering the need for a 25% Independent Producer Rule — a rule that **is** justified in view of the extreme degree of consolidation and network dominance that now **exists** in the narrow prime time television programming marketplace. Importantly, the Rust Court, like the Fox Court, *affirms* the regulator's **right** to act in a manner that the regulator believes will advance the public interest.* For this reason, since program diversity **is** — as this Commission has repeatedly affirmed — in the public interest, the Commission must take appropriate content neutral regulatory action to promote program diversity.

Anything less than adoption of this 25% Independent Producer Rule will be a transparent abandonment of the Commission's commitment to its goals of diversity and competition in the prime time television programming marketplace. Importantly, **from** a consumer perspective, **the** Commission's adoption of the judicially sustainable 25% Independent Producers Rule will restore diversity and competition to the network dominated prime time television marketplace — a marketplace where for decades, independent producers such **as** Norman Lear, Marian Rees, Marcy Carsey, Steve Cannell and Mary Tyler Moore produced non-network owned, diverse television programming that enriched the lives of countless television viewers in the United States.

⁴⁸ See id.

V. THE PUBLIC INTEREST AND THE 25% INDEPENDENT PRODUCER RULE

The Commission, in adopting its NPRM in ~~this~~ proceeding, reiterated its **longstanding** commitment to broadcast ownership policies that “traditionally have focused **on** advancing three **broadly** defined goals: (1) diversity, (2) competition, and (3) **localism**.”⁴⁹ These goals have repeatedly been embraced by the Commission **as** integral to the public interest — **and** they have consistently been upheld as valid goals by courts that reviewed **various** Commission broadcast ownership rules.

In two recent Powell Commission actions designed to promote the public interest, the Commission has articulated public interest policies that by analogy, complement and support CPD’s request that ~~the~~ Commission adopt the **25%** Independent Producer Rule.”

In a recent statement issued following the Commission’s unanimous **rejection** of the Echostar-Hughes Electronics merger, Chairman Powell explained that the Commission’s rejection of the proposed merger was “particularly **compelling**,”⁵¹ because consumers in **rural** America not served by cable would be left with only one choice for their subscription video service. Based on the Chairman’s and his fellow Commissioners’ concerns about limited programming sources in the EchoStar case, the Commission should be equally concerned about ~~the~~ limited sources of **programming** in today’s prime time network television marketplace. In ~~this~~ arena, ~~consumers~~ only

⁴⁹ 2002 Biennial Regulatory Review at ¶ 5.

⁵⁰ See Chairman Michael K. Powell, Statement re: Application of EchoStar Communications Corporation (Echostar); General Motors Corporation and **Hughes** Electronics Corporation (**DirectTV**) (Oct. 18, 2002); see also Federal Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at 11 (released Nov. 2002).

⁵¹ Chairman Michael K. Powell, Statement re: Application of EchoStar Communications Corporation (EchoStar); General Motors Corporation **and** Hughes Electronics Corporation (**DirectTV**) (Oct. 18, 2002).

have access to prime time television programming overwhelmingly developed and owned by the four networks.

Just as the Commission rejected the proposed Echostar-Hughes merger because it would diminish viewers' choice, the Commission must now act to remedy the stark anti-competitive reality of the current network-dominated prime time television programming marketplace. In view of today's grossly consolidated media marketplace that has resulted in diminished diversity of prime time television programming sources, the Commission must take appropriate regulatory action to promote program diversity in a content neutral manner. As demonstrated by the record before it, the Commission cannot rely alone on the narrow prime time television marketplace to promote competition and diversity of programming sources. CPD's filing in this proceeding confirms that this narrow marketplace, when left unregulated, deprives consumers of diverse sources of prime time television programming.

Separately, in the Commission's recently released Report by its Spectrum Policy Task Force (the "Task Force"),⁵² the FCC once again reiterated the need to take appropriate regulatory action when the marketplace alone is inadequate to achieve a particular public interest goal. Established by the Commission to develop policy options for the most enlightened use of the spectrum, the Task Force focused on the special public policy considerations guiding the Commission's regulation of spectrum used by broadcasters: "localism and diversity of ownership are two important public interest objectives that have been associated with broadcasting to a greater degree than other spectrum users"⁵³ and "the Commission's policies surrounding spectrum allocated for broadcasting

⁵²Federal Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at 11 (released Nov. 2002).

⁵³Id. at 45.

service, especially in the context of the conversion from analog to digital television, have **taken** into account localism and access to free-over-the air television.”⁵⁴ Importantly, the **Task Force also** “recognized that there may be situations where the **Commission finds** it necessary **to** promote **spectrum or** technical efficiency (**as** opposed to economic efficiency) in order to promote particular public interest **goals . . .** [where marketplace forces may be inadequate” to achieve particular public interest goals, the Commission’s spectrum policy experts urged the Commission to find alternative regulatory means to advance public interest goals that could be more important **than** “economic efficiencies.””

Since the four networks have long argued that important economic efficiencies have resulted from vertical integration and consolidation in the broadcast marketplace, **CPD’s** proposed **25%** Independent Producer Rule predictably **will** prompt vigorous opposition from the four networks. In opposing any carve out rule for independently produced **programming**, network advocates can be expected to argue that economic efficiencies are **vital** to the continued viability of **free** advertiser-supported network television. Moreover, network officials will claim pending economic doom if **25%** of their prime time schedule is produced and owned **by** independent producers.

When evaluating the networks’ predictable claims of financial **ruin** resulting from the **Commission’s** adoption of the **25%** Independent Producer Rule, the Commission must dismiss this bogus prognosis; in reality, **even** with the Commission’s adoption of a **25%** Independent Producer Rule, the networks will still garner 100% — all — of the advertising revenues **from their** prime time television schedule. Thus, the networks will not be financially diminished by the Commission’s

⁵⁴ **Id.** at 11.

⁵⁵ **Id.**

adoption of a rule that ensures increased consumer access to diverse prime time television **programming**. To the contrary, enhanced network prime time advertising revenues will occur following the FCC's adoption of the **25% Independent Producers Rule**.

While FCC officials who authored the Task Force Report appropriately focused **only** on the most efficient use of **spectrum**, they correctly articulated the need for general regulatory balance when considering "economic efficiencies."⁵⁶ Adherence to regulatory balance is particularly critical **in this** proceeding where it is abundantly clear that the current prime time marketplace **has** proven to be "inadequate" to promote the Commission's fundamental **goal** of diversity in the dysfunctional prime time programming marketplace.

When confronted with the reality that the prime time programming marketplace is simply "inadequate" to promote diversity and competition, it **is** incumbent **on** the Commission to set up the **least** intrusive conditions so that the FCC's fundamental goal of program diversity will be realized.

Adoption **of** the 25% Independent Producer Rule is a **judicially** sustainable content neutral means for the Commission to remedy the inadequacies in today's prime time television programming marketplace. Importantly, such action would be consistent with the Commission's **unanimous** vote in rejecting the EchoStar-Hughes Electronics merger and consistent with the **Task Force's recommendation** for regulatory balance **when** a marketplace is inadequate to advance **the** public interest."

⁵⁶ **Federal** Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at 21 (released Nov. 2002).

⁵⁷ See id.

VI. CONCLUSION

As the Commission considers the four networks' pleas for further deregulatory relief from the 35% cap and the Dual Network Rule — relief that will seriously exacerbate the already excessive consolidation in the U.S. broadcast marketplace — the Commission has an important and timely opportunity to promote its fundamental goals of diversity and competition in the narrow, network dominated prime time television programming marketplace. As documented by CPD in these comments, source diversity has significantly diminished in the past decade, leaving the public with substantially fewer options for access to diverse programming on prime time network television.

By adopting a content-neutral 25% prime time television rule for independently produced programming, the Commission will promote its bedrock goal of program diversity by affording a once vital independent production community the opportunity to again compete vigorously to bring diverse creative television programming to U.S. viewers of advertiser-supported free network prime time television.

With its adoption of the 25% Independent Producers Rule, the Commission also will simultaneously afford the advertising community — so vital to the continued viability of free television — the opportunity to support additional genres of diverse independently produced prime time television programming. Importantly, the 25% regulatory carve out for independent produced programming would not deprive the four networks of advertising revenues; even with the 25% Independent Producers Rule in place, the networks would still have exclusive access to all advertising revenues generated by their entire prime time schedule. Moreover, because the 25% Independent Producer Rule would result in more diverse prime time programming, this rule could be expected to increase the networks' advertising revenues by introducing vigorous independent

producer-generated competition in the network dominated, prime time television programming marketplace.

In terms of judicial sustainability, the Schurz Court, the Fox Court and the Rust Court all have confirmed the appropriateness of regulatory action to promote a legitimate Commission goal. In this case, the Commission's fundamental goals of promoting diversity and competition in the network dominated prime time television marketplace will be advanced by the adoption of the 25% Independent Producer Rule.

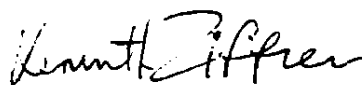
For U.S. consumers, particularly those 43 million prime time television viewers who are primarily dependent on advertiser-supported free television, the Commission's adoption of a 25% prime time television rule for independently produced programming would mean dramatically different and diverse programming choices. And these choices would not be dictated by the Commission since the 25% Independent Producer Rule would be content neutral.

The opportunity to significantly advance the Commission's dual goals of diversity and competition in the narrow network dominated prime time television marketplace is enormous, yet fleeting, as the Commission conducts its comprehensive review of its broadcast regulations.

The Commission's landmark review of its broadcast regulations also provides an important opportunity to generate added value for the public from the four networks' auction-free use of their analog and digital spectrum. For the millions of viewers of advertiser-supported network television, the FCC's adoption of the content neutral 25% Independent Producer Rule will mean that network programming — aired on spectrum that is a valuable public resource — will be more diverse because at least 25% of prime time television programming will be generated by independent non-network sources.

Since increased media consolidation — and diminished sources of prime time television programming — are inevitable by-products of further FCC deregulatory action, the Commission must adopt the content neutral 25% Independent Producer Rule proposed by the CPD. By taking this judicially sustainable action, the Commission will insure that future generations of U.S. viewers of advertiser supported prime time television will have access, at least in **25%** of cases, to a wide array of programming options developed by dozens of independent producers who compete fiercely to air their creative and diverse programming before U.S. consumers. Absent its adoption of the **25%** Independent Producer Rule, the Commission will limit consumers of prime time network television to the resmcted genres of programming ultimately chosen by four network officials.

Respectfully submitted,
COALITION FOR PROGRAM DIVERSITY



Kenneth Ziffren
Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie & Stiffelman LLP.



Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.

January 2, 2003

Appendix A

American Federation of Television and Radio Artists

American Federation of Television and Radio Artists (AFTRA) is a national labor organization representing over 80,000 professional employees working in the entertainment, news, advertising and sound recordings industries. AFTRA's membership includes actors, singers, and other performers appearing in all types of television programming, including dramatic programs, serials, game shows, and **talk** and variety shows; broadcasters on television and radio; sound recording artists; and performers in non-broadcast/industrial works and new technologies such as interactive programming and CD-ROMS.

Appendix B

The Directors Guild of America

The Directors Guild of America (DGA) represents 12,700 directors and members of the directorial team who work in feature film, filmed/taped/and live television, commercials, documentaries, and news. Members include Directors, Unit Production Managers, Assistant Directors, Associate Directors, Technical Coordinators, Stage Managers, and Production Associates. DGA serves as the exclusive collective bargaining representative for these individuals.

Appendix C

The Screen Actors Guild

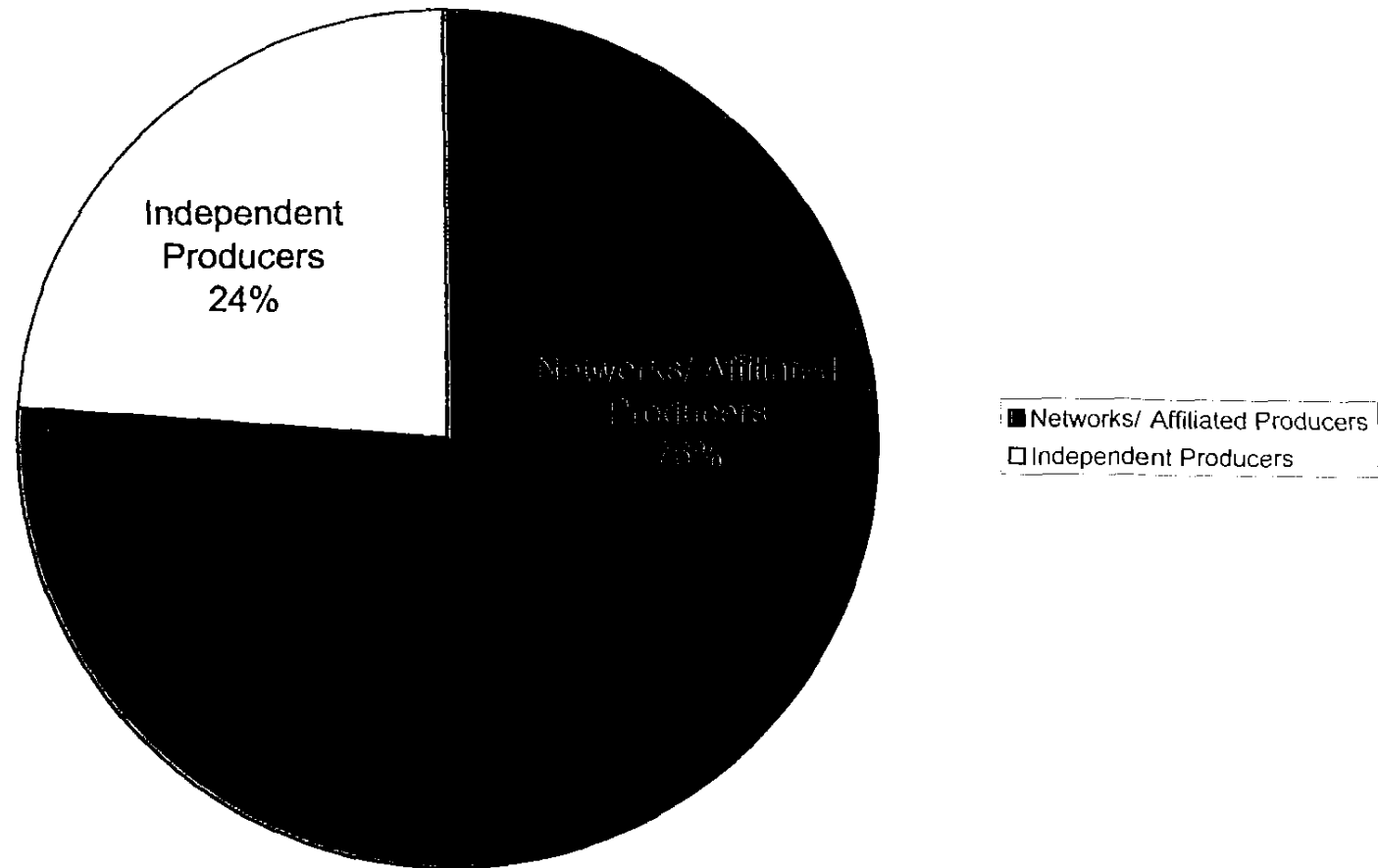
The Screen Actors Guild (SAG) has 120,000 members who work throughout the world under SAG contracts. SAG was founded in 1933 and represents actors in films, television, commercials and on the Internet. Melissa Gilbert is National President of the Screen Actors Guild.

Appendix D

Coalition for Program Diversity Study (CPD Study), 2002-2003 *TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

2002-2003 TV Season
Primetime Network Program Ownership (ABC,CBS,Fox, NBC)

71 Primetime Hours Per Week
(Excludes theatricals and MOWs)



Appendix E

CPD Study, 2002-2003 *Network Primetime TV Ownership* **Excluding** *Theatrical/MOW*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime **Network** Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
8 SIMPLE RULES	ABC	Touchstone	0.5	1	0.5		
LIFE WITH BONNIE	ABC	Touchstone	0.5	1	0.5		
LESS THAN PERFECT	ABC	Touchstone	0.5	1	0.5		
MEDS	ABC	Touchstone	1.0	1	1.0		
DINOTOPIA	ABC	Hallmark	1.0			1	1.0
PUSH, NEVADA	ABC	Touchstone	1.0	1	1.0		
THAT WAS THEN	ABC	Touchstone	1.0	1	1.0		
Drew Carey	ABC	Warner Bros.	0.5			1	0.5
Whose Line Is It Anyway?	ABC	Riverside Productions	0.5			1	0.5
Monday Night Football	ABC	ABC Sports	2.0	1	2.0		
According to Jim	ABC	Touchstone	0.5	1	0.5		
NYPD Blue	ABC	Bochco Productions	1.0			1	1.0
My Wife & Kids	ABC	Touchstone	0.5	1	0.5		
George Lopez	ABC	Warner Bros.	0.5			1	0.5
The Bachelor	ABC	Telepictures	1.0			1	1.0
Prime Time Thursday	ABC	ABC News	1.0	1	1.0		
Amer's Funniest Videos	ABC	ABC/Vin DiBona	1.0	1	1.0		
20/20	ABC	ABC News	1.0	1	1.0		
Wonderful World of Disney	ABC	Disney/ABC	2.0	1	2.0		
Alias	ABC	Touchstone	1.0	1	1.0		
The Practice	ABC	20th C Fox/Kelley	1.0	1	1.0		
Total	ABC		19.0		14.5		4.5
Percentage	ABC				76.3%		23.7%
STILL STANDING	CBS	Fox	0.5	1	0.5		
CSI: MIAMI	CBS	CBS/Alliance Atlantis	1.0	1	1.0		
PRESIDIO MED	CBS	Warner Bros.	1.0			1	1.0
WITHOUT A TRACE	CBS	CBS/Warner Bros.	1.0	1	1.0		
HACK	CBS	Big Ticket Television	1.0	1	1.0		
RHD/LA	CBS	Uni/Forward Pass, Inc.	1.0			1	1.0
BRAM AND ALICE	CBS	Paramount	0.5	1	0.5		

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
King of Queens	CBS	CBS/ColumbiaTriStar	0.5	1	0.5		
Yes, Dear	CBS	Fox	0.5	1	0.5		
Everybody Loves Raymond	CBS	CBS/Worldwide Pants	0.5	1	0.5		
JAG	CBS	Paramount/Belisarius	1.0	1	1.0		
The Guardian	CBS	CBS/ColumbiaTriStar	1.0	1	1.0		
Judging Amy	CBS	CBS/Fox	1.0	1	1.0		
60 Minutes II	CBS	CBS News	1.0	1	1.0		
Amazing Race	CBS	CBS/Touchstone	1.0	1	1.0		
Survivor	CBS	CBS Productions	1.0	1	1.0		
CSI	CBS	CBS/Alliance Atlantis	1.0	1	1.0		
48 Hours Investigates	CBS	CBS News	1.0	1	1.0		
Touched By An Angel	CBS	CBS Productions	1.0	1	1.0		
The District	CBS	CBS/Universal	1.0	1	1.0		
The Agency	CBS	CBS/Universal	1.0	1	1.0		
60 Minutes	CBS	CBS News	1.0	1	1.0		
Becker	CBS	Paramount/Industry	0.5	1	0.5		
Total	CBS		20.0		18.0		2.0
Percentage	CBS				90.0%		10.0%
OLIVER BEENE	Fox	Fox/Dreamworks	0.5	1	0.5		
THE GRUBBS	Fox	Fox/Granada/Uni	0.5	1	0.5		
GIRL'S CLUB	Fox	Kelley	1.0	1	1.0		
CEDRIC THE ENTERTAINER	Fox	Fox	0.5	1	0.5		
FASTLANE	Fox	Wamer Bros.	1.0			1	1.0
FIREFLY	Fox	Fox/Mutant Enemy	1.0	1	1.0		
JOHN DOE	Fox	Regency Television	1.0	1	1.0		
Futurama	Fox	Fox	0.5	1	0.5		
The Simpsons	Fox	Fox/Gracie	0.5	1	0.5		
King of the Hill	Fox	Fox	0.5	1	0.5		
Malcolm In The Middle	Fox	Fox/Regency	0.5	1	0.5		
Boston Public	Fox	Kelley	1.0	1	1.0		
That '70s Show	Fox	Carsey-Werner	0.5			1	0.5

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Grounded For Life	Fox	Carsey-Werner	0.5			1	0.5
24	Fox	Fox/Imagine	1.0	1	1.0		
Bernie Mac Show	Fox	Regency/Fox	0.5	1	0.5		
Cops	Fox	Fox TV Stations	0.5	1	0.5		
Cops II	Fox	Fox TV Stations	0.5	1	0.5		
America's Most Wanted	Fox	STF Productions	1.0	1	1.0		
Total	Fox		13.0		11.0		2.0
Percentage	Fox				84.6%		15.4%
IN-LAWS	NBC	NBC/Paramount	0.5	1	0.5		
HIDDEN HILLS	NBC	NBC	0.5	1	0.5		
GOOD MORNING MIAMI	NBC	Warner Bros.	0.5			1	0.5
AMERICAN DREAMS	NBC	NBC/Universal	1.0	1	1.0		
BOOMTOWN	NBC	NBC	1.0	1	1.0		
Fear Factor	NBC	Endemol	1.0			1	1.0
Third Watch	NBC	Warner Bros.	1.0			1	1.0
Crossing Jordan	NBC	NBC Studios	1.0	1	1.0		
Just Shoot Me	NBC	Brillstein-Grey et al	0.5			1	0.5
Frasier	NBC	Paramount	0.5	1	0.5		
Dateline NBC-Tuesday	NBC	NBC News	1.0	1	1.0		
Ed	NBC	NBC/Viacom	1.0	1	1.0		
West Wing	NBC	Warner Bros.	1.0			1	1.0
Law & Order	NBC	Universal	1.0			1	1.0
Friends	NBC	Warner Bros.	0.5			1	0.5
Scrubs	NBC	Touchstone	0.5	1	0.5		
Will & Grace	NBC	NBC Studios	0.5	1	0.5		
ER	NBC	Warner Bros.	1.0			1	1.0
Providence	NBC	NBC Studios	1.0	1	1.0		
Dateline NBC-Friday	NBC	NBC News	1.0	1	1.0		
Law & Order:SVU	NBC	Universal	1.0			1	1.0
Dateline NBC-Sunday	NBC	NBC News	1.0	1	1.0		
Law & Order: Criminal Intent	NBC	Universal	1.0			1	1.0

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Total	NBC		19.0		10.51		8.5
Percentage	NBC				55.3%		44.7%
HALF & HALF	UPN	CBS Productions	0.5	1	0.5		
HAUNTED	UPN	CBS/Viacom/Industry	1.0	1	1.0		
TWILIGHT ZONE	UPN	Trilogy/New Line	1.0			1	1.0
The Parkers	UPN	Big Ticket Television	0.5	1	0.5		
One on One	UPN	Paramount	0.5	1	0.5		
Girlfriends	UPN	Paramount	0.5	1	0.5		
Buffy The Vampire Slayer	UPN	Fox	1.0	1	1.0		
Enterprise	UPN	Paramount	1.0	1	1.0		
WWE Smackdown	UPN	WWE	2.0			1	2.0
Total	UPN		8.0		5.01		3.0
Percentage	UPN				62.5%		37.5%
EVERWOOD	WB	Warner Bros.	1.0			1	1.0
BIRDS OF PREY	WB	Warner/Tollin/Robbins	1.0			1	1.0
FAMILY AFFAIR	WB	Turner/Pariah	0.5	1	0.5		
DO OVER	WB	Warner/Paramount	0.5	1	0.5		
WHAT I LIKE ABOUT YOU	WB	Warner/Tollin/Robbins	0.5			1	0.5
GREETINGS FROM TUSCON	WB	Big Ticket Television	0.5	1	0.5		
7th Heaven	WB	Spelling	1.0	1	1.0		
Gilmore Girls	WB	Warner Bros.	1.0			1	1.0
Smallville	WB	Warner/Tollin/Robbins	1.0			1	1.0
Dawson's Creek	WB	Columbia/Tri-Star	1.0			1	1.0
Jamie Kennedy Experiment	WB	Warner Bros./Big Tkt	0.5	1	0.5		
Off Centre	WB	Warner/Dreamworks	0.5			1	0.5
Sabrina	WB	Viacom Productions	0.5	1	0.5		
Reba	WB	Fox	0.5	1	0.5		
Gilmore Girls: Beginnings	WB	Warner Bros.	1.0			1	1.0
Charmed	WB	Spelling Television	1.0	1	1.0		

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

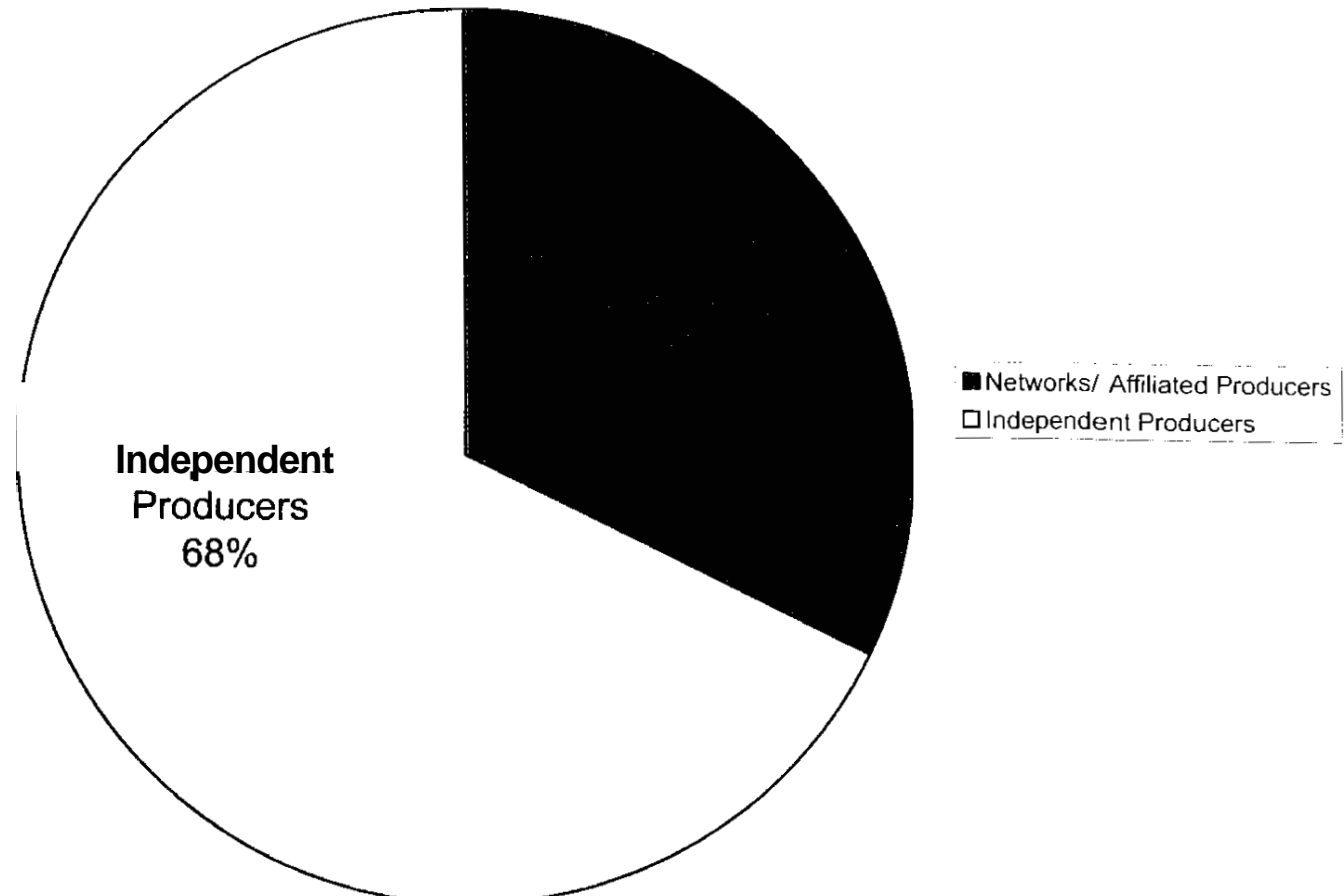
TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or	Affiliated Producers	An Independent	Producer
				# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Angel	WB	Fox/Greenwalt	1.0	1	1.0		
Total	WB		13.0		6.0		7.0
Percentage	WB				46.2%		53.8%
TOTAL FOR 4 NETS			71.0		54.0		17.0
PERCENTAGE FOR 4 NETS					76.1%		23.9%
TOTAL FOR 6 NETS			92.0		65.0		27.0
PERCENTAGE FOR 6 NETS					70.7%		29.3%
TOTAL FOR UPN & WB NETS			21.0		11.0		10.0
PERCENTAGE FOR UPN & WB NETS					52.4%		47.6%
DEFINITIONS:							
Networks or Affiliated Producer : Network ownership or ownership by production entity affiliated with one of the four broadcast							
Independent Producers: Ownership by any studio not affiliated with a broadcast network (MGM/UA, Universal, DreamWorks,							

Appendix F

CPD Study, *1992-1993 TV Season **Primetime** Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, *Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season* (Sept. 1992)).

1992-1993 TV Season
Primetime Network Program Ownership (ABC,CBS,Fox, NBC)

70 Primetime Hours Per Week
(Excludes theatricals and MOWs)



Appendix G

CPD Study, *1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992)).

1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	Production Co	Copyright Holder	Length	Networks		Produced By	
					Or		An Independent	
					Affiliated Producers		Producer	
				Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
HANGIN' WITH MR. COOPER	ABC	Lorimar	Lorimar TV	0.5			1	0.5
GOING TO EXTREMES	ABC	Lorimar/Brand & Falsey	Lorimar TV	1.0			1	1.0
LAURIE HILL	ABC	Black & Marlene	Touchstone	0.5			1	0.5
DELTA	ABC	Universal		0.5			1	0.5
CAMP WILDER	ABC	ABC Productions		0.5	1	0.5		
COVINGTON CROSS	ABC	Reeves Ent.		1.0			1	1.0
CROSSROADS	ABC	Finnegan-Pinchuk	Lorimar TV	1.0			1	1.0
Young Indiana Jones	ABC	Lucasfilm		1.0			1	1.0
Monday Night Football	ABC	ABC Sports		2.0	1	2.0		
Full House	ABC	Lorimar/ Miller et al		0.5			1	0.5
Roseanne	ABC	Carsey-Werner		0.5			1	0.5
Coach	ABC	Universal		0.5			1	0.5
Wonder Years	ABC	Black & Marlene	Four Star Holdings	0.5			1	0.5
Doogie Howser, MD	ABC	Bohco		0.5			1	0.5
Home Improvement	ABC	Disney	Touchstone	0.5			1	0.5
Civil Wars	ABC	Bohco		1.0			1	1.0
Room for Two	ABC	Warner Bros		0.5			1	0.5
Homefront	ABC	Lorimar	Lorimar TV	1.0			1	1.0
Primetime Live	ABC	ABC News	ABC	1.0	1	1.0		
Family Matters	ABC	Lorimar/Miller et al		0.5			1	0.5
Step By Step	ABC	Lorimar/Miller et al	Lorimar TV	0.5			1	0.5
Dinosaurs	ABC	Henson	Walt Disney TV	0.5			1	0.5
20/20	ABC	ABC News		1.0	1	1.0		
The Commish	ABC	ABC/Cannell		1.0	1	1.0		
Life Goes On	ABC	Toots Prods/Warner Bro	Warner Bros.	1.0			1	1.0
America's Funniest Videos	ABC	ABC/DiBona		0.5	1	0.5		
America's Funniest People	ABC	ABC/DiBona		0.5	1	0.5		
Total	ABC			20.0	7.0	6.5	20.0	13.5
Percentage	ABC					32.5%		67.5%
HEARTS-A-FIRE	CBS	Mozark		0.5			1	0.5
LOVE AND WAR	CBS	Shukovsky/English		0.5			1	0.5
THE HAT SQUAD	CBS	Cannell	Stephen Cannell	1.0			1	1.0
BOB	CBS	Paramount		0.5			1	0.5
PICKET FENCES	CBS	Fox	20th C Fox	1.0	1	1.0		
FRANNIE'S TURN	CBS	Carsey-Werner		0.5			1	0.5
RAVEN	CBS	Columbia	Columbia Pictures TV	1.0			1	1.0
ANGEL STREET	CBS	Warner		1.0			1	1.0
Evening Shade	CBS	CBS/MTM		0.5	1	0.5		
Murphy Brown	CBS	Shukovsky/English	Time Warner Entert	0.5			1	0.5
Northern Exposure	CBS	Finnegan-Pinchuk	Universal City Studios	1.0			1	1.0
Rescue 911	CBS	CBS/Shapiro	CBS	1.0	1	1.0		
In the Heat of the Night	CBS	Silverman/MGM	MGM/UA	1.0			1	1.0
48 Hours	CBS	CBS News		1.0	1	1.0		
Top Cops	CBS	CBS Canada/Grosso-Jacobson		1.0	1	1.0		
Street Stories	CBS	CBS News	CBS	1.0	1	1.0		
Knots Landing	CBS	Lorimar	Lorimar	1.0			1	1.0
Golden Palace	CBS	Witt-Thomas-Harris	Touchstone	0.5			1	0.5
Major Dad	CBS	Universal	Universal City Studios	0.5			1	0.5
Designing Women	CBS	Mozark	Columbia Pictures TV	0.5			1	0.5
Brooklyn Bridge	CBS	UBU	Paramount Pictures	0.5			1	0.5

1992-1993 Network PrimetimeTV Ownership Excluding TheatricalIMOW

TITLE	NET	Production Co	Copyright Holder	Length	Networks		Produced By	
					Or		An Independent	
					Affiliated Producers		Producer	
				Hrs/wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Wings	NBC	Paramount	Paramount	0.5			1	0.5
LA Law	NBC	Fox	20th C Fox	1.0	1	1.0		
I'll Fly Away	NBC	Lorimar/Brand & Falsey	Lorimar	1.0			1	1.0
Empty Nest	NBC	Witt-Thomas-Harris	Touchstone TV	0.5			1	0.5
Nurses	NBC	Witt-Thomas-Harris	Touchstone TV	0.5			1	0.5
Sisters	NBC	Lorimar	Lorimar	1.0			1	1.0
Total	NBC			18.0	8.0	6.0	17.0	12.0
Percentage	NBC					33.3%		66.7%
TOTAL FOR ALL NETS					28.0	22.5	69.0	47.5
PERCENTAGE FOR ALL NETS						32.1%		67.9%
DEFINITIONS:								
Networks or Affiliated Producer : Network ownership or ownership by production entity affiliated with Fox								
Independent Producers: Ownership by any studio not affiliated with a broadcast network or independent production company.								